

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by**

MADISON HEARING OFFICE
1801 Aberg Ave., suite A
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

Mary Lenon, Lenon Bus Service

Hearing Number 98-175
Re: PECFA Claim 53179-9742-01

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
Gretchen Mrozinski

DATED AND MAILED:
November 3, 2000

MAILED TO:

Appellant Agent or Attorney

Matthew H. Quinn
Hand & Quinn
932 Lake Avenue
Racine, WI 53403-1519

Department of Commerce

Kristiane Randal
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

In the matter of the claim for Reimbursement under the provisions of the PECFA program by:

Mary Lenon, Lenon Bus Service
P.O. Box 8
Lake Geneva, WI 53147

PECFA Claim No. 53179-9742-01
Hearing No. 98-175

PROPOSED DECISION

A decision of the Department of Commerce ("Department") concerning the Petroleum Environmental Cleanup Act ("PECFA") was issued on October 21, 1998, denying reimbursement for portions of the claim submitted by Mary Lenon on behalf of Lenon Bus Service Inc. ("claimant"). The claimant timely appealed. A hearing was held on May 2, 2000, before Administrative Law Judge Gretchen Mrozinski. Following the hearing, written briefs were received- from the claimant and the Department.

FINDINGS OF FACT

The claimant is a corporation that provides contract and charter bus services. Mary Lenon is the president of the corporation. In February 1994, Mary Lenon contacted Otto Jacobs, Inc., an excavator, for the purpose of removing an underground diesel storage tank ("UST") located on the claimant's property. Otto Jacobs submitted a proposal that the claimant accepted on April 24, 1994. The scope of the project was subsequently expanded to include cleanup of a waste oil spill (which spill was not part of the PECFA claim for reimbursement by the claimant). The waste oil spill was investigated by the Department of Natural Resources ("DNR") in March 1994.

Mary Lenon relied on Otto Jacobs Inc., to remove the tank and clean up the spill. Otto Jacobs Inc. contracted with Gabriel-Midwest to help with the removal. On May 12, 1994, Mary Lenon met at the site with representatives of Otto Jacobs Inc. and Gabriel-Midwest. Mary Lenon testified that based upon that discussion, she believed that the amount of contamination from both the waste oil spill and the UST removal would be small. Prior to the removal of the UST Mary Lenon did not intend to seek PECFA reimbursement. She intended for the claimant to pay for the costs associated with removing the UST. Mary Lenon testified that she was aware of the PECFA program "quite some time" before the removal of the UST.

On June 6, 1994, Otto Jacobs Inc. and Gabriel-Midwest dug test pits in order to define the extent of the contamination around the UST system. Approximately 370 cubic yards of soil were contaminated.

Approximately 398 cubic yards of soil, as well as the UST, were excavated from the site in order to remove the contamination. The excavation took place on June 7 and 8, 1994. On July 21, 1994, Gabriel-Midwest submitted a report to Otto Jacobs Inc reporting on the completion of a "Closure Assessment on the Removal of One Underground Storage Tank" ("Tank Closure Report"). That document identified the environmental consultant as William J. Liniewicz, Jr. of Gabriel-Midwest. The Tank Closure Report indicated that samples taken below the tank pipeline and pump showed measurable readings of contamination. However, all soil samples sent to the laboratory tested clean for diesel range contaminants.

On December 28, 1994, counsel for the claimant notified the DNR that the UST has been removed. The DNR responded by letter dated February 23, 1995 directing the claimant to carry out additional soil sampling for gasoline range organics. Drake Environmental was hired by the claimant to carry out the additional work. The reimbursement of costs associated with Drake Environmental's work is not the subject of this appeal. After the UST and soil were removed, Mary Lenon, via Drake Environmental, inquired as to PECFA eligibility.

Prior to the claimant's submission of the PECFA claim, Drake Environmental requested a waiver from the requirements of Wis. Admin. Code Ch. ILHR 47 (currently known as COMM 47). The waiver was requested based upon the claimant's understanding that costs incurred in connection with the remediation of contaminated soil associated with the UST may not be PECFA eligible. The request for waiver was denied. The claimant filed a remedial action fund application on October 24, 1997. The claim included the \$11,892.32 for disposal of contaminated soil at the landfill (Waste Management invoice); \$6,835.00 of \$8,375.00 paid to Gabriel-Midwest for engineering services; and \$10,003.63 of \$11,133.89 paid to Otto Jacobs Inc. for excavation and tank removal. The Department audited the application and issued a decision on October 21, 1998. The above three items were denied by the Department because the claimant failed to obtain three consultant proposals, to submit three remediation alternatives and to use the competitive bid process to hire the excavator as required under Wis. Admin. Code § ILHR 47.01(4). The claimant timely appealed as to those denied costs. Other invoices/items were denied by the Department, but were not appealed by the claimant.

On February 28, 2000, the Department made -a motion to dismiss based upon the claimant's alleged failure to notify the DNR of a "confirmed discharge" pursuant to Wis. Admin. Code §§ ILHR 47.30(2)(a)4 and 47.53(1)(b)2. The Administrative Law Judge denied the motion to dismiss. The denial advised the Department that if it wished to revisit the issue, it would be expected to present expert testimony from the DNR concerning the DNR's "requirements" of Wis. Stat. § 292.11 and whether the DNR considered such requirements to have been met. The Department did not revisit the issue during the hearing. However, the Department argued the issue in its post-hearing brief.

A hearing was held on May 2, 2000. Witnesses were Linda Collier-Thompson and Mary Ann Gosda for the Department, and Mary Lenon for the claimant.

STATUTES AND REGULATIONS

Wis. Stat. § 101.143(3)(g) *Emergency Situations*.. Notwithstanding pars. (a)3 and (c)1 and 2, an owner or operator or the person may submit a claim for an award under sub. (4) after notifying the department under par. (a)3, without completing an investigation under par. (c)1 and without preparing a remedial action plan, under, par., (c)2 If any of the following apply:

1. An emergency existed which made the investigation under par.(c)1. and the remedial action plan under par. (c)2. inappropriate.

2. The owner or operator or the person acted in good faith in conducting the remedial action activities and did not willfully avoid conducting the investigation under par.(c)1 or the remedial action plan under par.(c)2.

Wis. Admin. Code § ILHR 47.01(4) CONTROL OF COSTS. The framework for the control of costs within the PECFA program shall be based upon the responsible party minimizing costs in all phases of the remediation. The primary structural factors for the control of costs include the following:

(a) The selection of a consulting firm through a comparison of at least 3 proposals. Once selected, the firm may only provide professional consulting services on the remediation;

(b) The requirement to purchase or contract for commodity services through the use of competitive bids;

(c) The consideration of the costs and benefits of remediation alternatives;

(d) The use of environmental factors to determine the eligible range of responses on a site;

(e) The use of site building and competitive bidding to reduce costs;

(f) The registration for participation in the PECFA program, only those consultants and consulting firms which meet specific qualifying criteria and standards of conduct; and

(g) The publication of cost guidelines for cost-effective remediation..

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

This decision does not address the issue of whether the DNR was properly notified of a discharge pursuant to Wis. Stat. § 292.11. Pursuant to a prehearing motion decision, the Department was advised that if it wished to address such issue, it would be expected to produce expert testimony from the DNR to establish whether the DNR considered communications from the claimant to represent notification of a discharge. The Department did not present such testimony and the Department did not again raise that issue during the hearing. Accordingly, the Department is considered to have waived that issue.

The Department and the claimant agree that the appealed costs did not comply with Wis. Admin. Code § ILHR 47.01. The claimant did not obtain three consultant proposals; it did not submit three remediation alternatives; and it did not use the competitive bid process to hire the excavator as required by the above code section.

Nevertheless, the claimant seeks to have the appealed items reimbursed on the basis that such costs were incurred in good faith pursuant to Wis. Stat. § 101.143(3)(g). The Department argues that this section only applies to emergency situations and accordingly does not apply to the matter at hand. The claimant concedes that an emergency situation did not exist, but asserts that this section is not limited to emergency situations. This tribunal does not find it necessary to decide whether § 101.143(3)(g) applies

only to emergency situations because this tribunal finds that the claimant's actions were not undertaken in good faith. *Black's Law Dictionary* defines good faith" as

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259, 260. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. *Efron v. Kalmanovitz*, 249 Cal.App. 187, 57 Cal.Rptr. 248, 151.

Henry Campbell Black, M. A., *Black's Law Dictionary* 693 (6th ed. 1990).

The claimant had the burden of proving that its actions were in good faith. It has failed to do so. First, Mary Lenon as president of the claimant had the authority to act on behalf of the claimant. Mary Lenon was aware that the PECFA program existed prior to the UST's removal. Accordingly, she was put on notice that a program existed to reimburse certain costs associated with the removal of petroleum storage tanks. Instead of making inquiries as to the requirements of the PECFA program and to determine if such program applied to her circumstances, she instead hired Otto Jacobs Inc. and gave Otto Jacobs Inc. the authority and control to remove the UST. She made the decision to forego PECFA inquiries because she intended for the claimant to pay for the removal itself. Because she was aware of the PECFA program, Mary Lenon had an obligation to inquire as to the claimant's PECFA, eligibility before going ahead and having the UST removed. Then, she could have made an informed decision as to whether she should proceed with the UST removal on her own accord or follow PECFA requirements. Accordingly, Mary Lenon's actions in this regard cannot be considered to have been undertaken in good faith.

Second, Mary Lenon was not the only person/entity who made decisions and acted on behalf of the claimant regarding the removal of the UST. Yet, in order to determine whether the claimant acted in good faith, this tribunal must examine the actions of the claimant as a whole. This includes the actions of those who acted on behalf of the claimant. Mary Lenon testified that the claimant's vice-president was involved in various aspects of the tank removal, particularly being present at the site during the removal. Nevertheless, the vice-president was not present at the hearing. Therefore, he/she could not be questioned regarding his/her actions and whether such actions were undertaken in good faith. In addition, the actions of Otto Jacobs Inc. and Gabriel-Midwest must be examined because they were the agents of the claimant. Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement (Second) of Agency §1. Mary Lenon contracted with Otto Jacobs Inc. to remove the UST. In turn, Otto Jacobs Inc. contracted with Gabriel-Midwest to assist with the UST removal and remediation. She testified that she relied on Otto Jacobs Inc. and Gabriel-Midwest to remove the UST properly. The persuasive evidence established that Mary Lenon gave Otto Jacobs Inc. the authority, express and implied, to act on behalf of the claimant regarding the removal of the UST. Under the circumstances, Otto Jacobs Inc. and Gabriel-Midwest were agents of the claimant.

The actions of the agent are imputed to the principal. Accordingly, the actions of Otto Jacobs Inc. and Gabriel-Midwest are relevant to determine whether the claimant acted in good faith. Again, the

claimant did not produce their testimony. Without such testimony, this tribunal cannot determine whether the claimant acted in good faith. This tribunal does not know whether Otto Jacobs Inc. and/or Gabriel-Midwest considered the PECFA program in relation to the removal of the UST. This tribunal does not know what conversations, if any, those entities had with the claimant's vice-president concerning PECFA. This tribunal does not know what those entities said to Mary Lenon, if anything, regarding the PECFA program. Mary Lenon testified that very little was said about PECFA by these entities. However, such testimony was hearsay. In short, the absence of testimony from Otto Jacobs Inc. and Gabriel-Midwest only serves to undercut the claimant's argument that it acted in good faith.

Under the circumstances, it cannot be found that the claimant acted in good faith. Accordingly, the claimant is not entitled to reimbursement of the aforementioned costs.

DECISION

The Department's decision of October 21 1998 denying reimbursement to the claimant for a portion of the costs which it incurred this matter is affirmed.

APPEAL TRIBUNAL

By
Gretchen Mrozinski
Administrative Law Judge